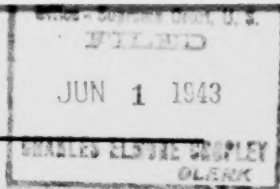




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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

No. 877

WERT T. REED AND F. F. DOLLERT
Petitioners

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL
Respondents

SUPPLEMENTAL PETITION FOR REHEARING

ARTHUR H. BARTELT,
Austin, Texas

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Attorneys for Petitioners



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*To the Honorable Chief Justice of the United States
and the Associated Justices of the Supreme
Court of the United States:*

The Judgment Dismissing with Prejudice in the Case of Hewit et al v. the Pratt-Hewit Corporation et al in the District Court of Refugio County on January 26, 1927, During Vacation Time, is Void as it Appears on the Record of the Judgment Pleaded by the Houston Oil Company in its Motion to Dismiss Plaintiff's Second Amended Complaint (Tr. R. 223-228), in that F. F. Dollert and the Pratt-Hewit Corporation, Being Parties in the Case, Did Not Give Their Consent to Taking up the Case During Vacation Time as Required by Article 1915 of the Vernon Anno. Civ. Statutes of Texas.

The District Court, in its conclusions of law No. 3, found that intervenor F. F. Dollert was bound by the "judgment of dismissal with prejudice entered in that case in 1937 and cannot recover here, and the defendants' plea of *res adjudicata* heretofore filed will at this time be sustained." (Tr. R. 518) The Circuit Court of Appeals says "The findings and conclusions of the District Court are free from error."

"Section 80. Powers in Vacation—The general rule is that all judicial business must be transacted by a court in term time and that only such business can be disposed of in vacation as is expressly authorized by the Constitution and statutes under which the court exists, and that a judge after adjournment may not, without *express* authority, take any action or render any order whatever. In an early case, *Hunter v. Nichols*, 55 Tex. 217, 224, it was said by the Supreme Court:

'It is with us inherent in the very conception of a court that its session shall be publicly held; that what it does shall *not be done in a corner*; and hence it is that *time*, and place, and terms, are prescribed for its sessions by law.

And a court cannot lawfully hold its sitting at any other *time* or place. Judgments or decrees out of term time are simply void—they are *utter nullities*. *Hodges v. Ward & Ingram*, 1 Tex. 244; *Crosby v. Houston*, 1 Tex. 203; *Womack v. Womack*, 17 Tex. 2; *Freeman on Judgments* 121.'

"The statute, however, provides that: 'Art. 1915. (1714) Powers in vacation.

Judges of the district courts may in vacation, by consent of the parties, exercise all powers, make all orders, and perform all acts, as fully as in term time, and may, by consent of the parties, try any civil case, except divorce cases, without a jury and enter final judgment, etc." 11 Tex. Jur. p. 816.

The court terms of the district court of Refugio County, Texas, are as follows: "On the sixth Monday, after the second Monday in February and the sixth Monday after the first Monday in September and may continue *three* weeks." Art. 199 of the Vernon Civ. Statutes of Texas.

"The case not having been tried by consent of the parties in vacation, under the terms of Article 1714, the action of the court in dismissing the petition was likewise erroneous. It is well settled in this state, as well as in other jurisdictions, that a judge during vacation cannot dismiss a bill in equity. Price v. Bland, 44 Tex. 145; Aiken v. Carroll, 37 Tex. 73; Coleman v. Goynes, 37 Tex. 552; Grant v. Chambers, 34 Tex. 574-588; Ann. Cas. 1916A. 1230, notes." Walker et al v. Meyers et al., 266 S. W. 499. (Sup. Ct. of Texas).

"All judicial business must be transacted by a court in *term time*, except such as may be specially authorized by constitutional or valid statutory provisions. Texas Electric & Ice Co. v. City of Vernon, Tex. Civ. App. 254 S. W. 503" Citizens State Bank etc. v. Miller County Judge, 115 S. W. 2d 1183 (Civ. App.)

Thus the Circuit Court of Appeals has decided an important question of local law in a way that is in direct conflict with the statutes and Constitution of Texas and the applicable local decisions of the courts of that state.

Inasmuch as the record of the judgment on its face, as pleaded by the Houston Oil Company in its motion to dismiss plaintiff's second amended complaint, shows that neither Dollert nor the Pratt-Hewit Corporation consented to take up this case during vacation time, the judgment in the State Court is void and a nullity on its face. It does not constitute an adjudication of question of whether the September 28, 1925 contract is or is not illegal and void. Nevertheless, in its results, following from the Circuit Court affirming the decision of the district court, it is permitting the Houston Oil Company to take possession of and keep the property of the Pratt-Hewit Corporation without there ever having been an adjudication as to whether the property rightfully belonged to the Houston Oil Company. Thus the decision of the Circuit Court presents an unlawful taking of the property of the Pratt-Hewit Corporation in violation of the 5th Amendment of the Constitution of the United States, a Federal question decided in a way probably not in accord with the applicable decisions of this Court and also presents an unlawful taking of property in violation of Article I section 19 of the Constitution of Texas.

The facts pertaining to this jurisdictional question are set out in more detail in petitioners' reply

brief to the brief of the respondents, Houston Oil Company et al on pages 2-13, where petitioners contended that the failure of the Court or of the defendants to give notice to Dollert and to the Pratt-Hewit Corporation that the case would be taken up in vacation time and dismissed, constituted a violation of the Fifth and Fourteenth Amendments of the United States Constitution. F. F. Dollert had appeared by his attorney, Mr. Booth of San Antonio, and intervened as a plaintiff, adopting the petition of plaintiff, Hewit. The Pratt-Hewit Corporation, although the real plaintiff, was nominally a defendant. Pratt and the other directors and officials of the Pratt-Hewit Corporation were all made defendants. Attorneys Crain & Vandenberg, the personal attorneys of Pratt in the case, attempted to represent the Pratt-Hewit Corporation in giving consent to taking up this case during vacation time, which they were disqualified from doing because they could not appear for both plaintiff and defendant. (Tr. 223-228)

Petitioners do not want to be understood to be admitting that the issues in the case in the state court were the same as the issues in the instant case. That is impossible because the evidence of the 18 overt acts of Pratt with the Houston Oil Company which shows a conflict between Pratt's private interests and the duty he owed to his corporation, was not discovered until two years after the judgment in the State Court was entered.

Wherefore, upon the foregoing grounds and those offered in the original petition for rehearing, it is respectfully urged that the petition for rehearing be

granted and that the judgment of the Circuit Court of Appeals be upon further consideration reversed.

Respectfully submitted,

ARTHUR H. BARTELT,
Austin, Texas
W. B. RUBIN,
Milwaukee, Wisconsin
Attorneys for Petitioners

CERTIFICATE OF COUNSEL

I, one of the counsels for the above-named appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Arthur H Bartelt

ARTHUR H. BARTELT
Counsel for Appellants.

